80-1021

Supreme Court, U.S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

MICHAEL R. WOOD,

Petitioner,

-vs-

FIVE POINTS SHOPPING CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD
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QUESTION PRESENTED

1. Is a case indistinguishable from Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336, where a district judge remanded on a ground he had no authority to consider, viz., the crowded condition of the federal docket?

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FIVE POINTS SHOPPING CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner Michael R. Wood respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. The final order of remand was rendered by the District Court for the Central District of California, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 16, 1980. A timely petition for rehearing was denied on September 19, 1980, and this petition for certiorari was filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Is a case indistinguishable from Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336, where a district judge remanded on a ground he had no authority to consider, viz., the crowded condition of the federal docket?

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §1441(a) provides that unless otherwise expressly provided by Act of Congress, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," may be removed by the defendant to the district court of the United States.

Section 1446 provides the procedure for removal, and a case removed under that

section may be remanded only in accordance with §1447 which governs procedure after removal. Section 1447(c) provides in part:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

Section 1447(d) generally forbids review of remand orders:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State from which it is removed pursuant to section 1443 of this title shall be reviewable on appeal or otherwise.

It is unquestioned in this case and conceded by the petitioner that this section prohibits review of all remand orders issued

pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ.

STATEMENT OF THE CASE

The sole issue here is whether §1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by §1447(c). The District Court did not purport to proceed on the basis that this case had been removed "improvidently and without jurisdiction." Neither the propriety of the removal nor the jurisdiction of the court was questioned by the judge in the slightest. Section 1447(c) was not even mentioned. Instead, the District Court's order was based on grounds wholly different from those upon which §1447(c) permits remand. The transcript of the hearing shows that the judge remanded the case because "This court is not disposed to try an unlawful detainer case" [Tr. 8/18/80,

p. 6, line 25; p. 7, line 1]. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under §1441, and hence to the question whether this cause was removed "improvidently and without jurisdiction" within the meaning of the statute.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REMANDING ON GROUNDS NOT PERMITTED BY THE CONTROLLING STATUTE.

Although the Court of Appeals erroneously held that the District Court had jurisdiction to enter its remand order, the Court of Appeals did not mention §1447(c), did not suggest that the District Court had proceeded under that section, properly or

improperly, and did not itself suggest that this case was not removable under §1441 or that it had been improvidently removed from the State court for want of jurisdiction or otherwise. In the face of petitioner's position that the remand was for reasons not authorized by the statute, the Court of Appeals acted solely on the ground that under §1447(d) it had no jurisdiction to entertain a petition for writ of mandamus challenging the remand order issued by the District Court in this case.

But §1447(d) does not prevent review of remand orders in and of itself. That section and §1447(c) must be read together. These provisions are in pari materia and must be construed with reference to each other.

The district judge's inclination not to try an unlawful detainer case is a ground wholly different and plainly irrelevant to the provisions of §1447(c). Therefore, the

remand was unauthorized under Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CONCLUSIVELY DEPRIVED THE PETITIONER OF ANY REMEDY, WHATSOEVER, AND TOTALLY FAILED TO RESOLVE THE RECURRING ARGUMENT OF WHETHER A DISTRICT COURT JUDGE IS CONSTRAINED TO RETAIN JURISDICTION OVER DIVERSITY ACTIONS, PROPERLY REMOVED, AND FORBIDDEN TO ARBITRARILY REMAND SUCH ACTIONS UPON PURELY DISCRETIONARY GROUNDS, OTHER THAN NON-WAIVABLE JURISDICTIONAL DEFECTS, WHICH RECURRING ARGUMENT GREATLY AFFECTS FEDERAL JURISDICTION IN THE DISTRICT COURTS.

Petitioner, as admitted by the respondent herein, properly removed this action in strict compliance with all statutory and

jurisdictional requirements. Respondent arbitrarily remanded the action upon purely discretionary grounds, after having previously properly assumed and exercised jurisdiction. The refusal of the Circuit Court of Appeals for the Ninth Circuit to accept jurisdiction and determine the issue involved herein granted continued and unlimited discretion to the respondent and other District Court judges to remand cases, even though properly removed, as they see fit. In so doing, the Circuit Court of Appeals for the Ninth Circuit has also prevented this petitioner from obtaining any review, whatsoever, of the purely discretionary decision of the respondent. The denial of review to this petitioner is unconscionable. Furthermore, to permit such unbridled discretion would certainly have considerable impact upon federal jurisdiction, not only within the Ninth Circuit, but throughout the nation.

The argument pronounced in judicial decree by the respondent has recurred in various courts; however, that contention has been consistently rejected.

In Romero v. ITE Imperial Corporations, 332 F.Supp. 523 (D.C.P.R. 1971), a timely petition for removal was filed on January 19, 1971. On July 7, 1971, the plaintiff filed a motion to remand based upon the grounds that a remand would speed up the proceedings and would therefore be in the interest of justice. The court stated, at page 526, as follows:

> "The right to remove an action from a state court to the Federal District Court is a statutory right and it is a right that has existed since the original Judiciary Act of 1789. (Citations omitted.) 'The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal

jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.' (Citation omitted.)

"Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct . . . Once the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff." (Emphasis added.)

In Vann v Jackson, 165 F. Supp. 377 (E.D.N.C. 1958), the court addressed the issue of discretionary authority to remand,

at pages 380-381, as follows:

> "(T)he proposition has been advanced that the court has discretionary power to remand this case to the state court, even though properly removed to the federal court. In considering this question, the court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of justice to exercise such discretion.
>
> * * * Since there is no means for reviewing an order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (Citation omitted.) The court is without power to remand if no discretionary power exists.

* * * It is concluded that where congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court." (Emphasis added.)

In Asbrandtsen v District 2, Marine Engineers Beneficial Association, AFL-CIO, 256 F.Supp. 68 (E.D.N.Y. 1966), the District Judge gave short shrift to the argument that despite the court's jurisdiction, that it had discretion to remand, at page 77, as follows:

"The Union urges the court to remand to the state court despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will be applied . . . It assumes that despite a finding of

federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be subject to review . . . Having jurisdiction, this court in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention. Even if there were such a discretionary power, the court would not exercise it in favor of a remand."

In Davis v Joyner, 240 F.Supp. 689 (E.D.N.C. 1964), the identical question presented in the case of Vann v Jackson, supra, and Larkin v Roseberry, 54 F.Supp. 373 (E.D. Ky. 1944), was presented to the court. The court, therein, stated, at page 691, that the court's authority to remand is found in Title 28 U.S.C. §1447(c) and provides that the District Court shall

remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case, in the instant action.

The statutory right of removal is a valuable right which must be protected by the District Courts. Home Insurance Co. v Morse, 20 Wall 445, 22 L. Ed. 365 (1874); Muller v Lyke Coastwise Line, 144 F. Supp. 135 (S.D. Tex. 1940); and Gentle v Lamb-Weston, Inc., 302 F.Supp. 161 (N.D. Maine 1969). Thus, when a District Court is presented with an action of which it has cognizance, it may not turn the matter over for adjudication to the state court. Mach-Tronics, Incorporated v Zirpoli, 316 F.2d 820 (9th Cir. 1963).

It is readily apparent that the recurring argument, propounded by litigants in favor of granting discretionary power to remand, has been consistently rejected by District Court judges. Respondent is

apparently the first District Court judge to actually infer such discretionary power, sua sponte, to remand or infer such discretionary power from the statutory provisions, where such discretion is not founded upon any legal basis or jurisdictional basis but solely upon discretionary considerations. Such discretion cannot be justified. Only if an action is removed "improvidently," which means "wrongfully or without legal basis," and if the District Court is without jurisdiction can a case be remanded. Harlan Laboratory v Topp's Chewing Gum, 131 F.Supp 262, 267 (E.D.N.Y. 1955). Of course, in those cases removed improvidently and without jurisdiction, the judicial discretion exercised is based upon legal conclusions and not discretionary considerations. Such is certainly not the instant case.

It is, therefore, submitted that this petitioner be afforded at least a review of

the discretionary decisions below. "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD,

Petitioner,

-vs-

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDONALD GROUP, LTD., a Nevada Corporation,

Real Parties in Interest.

FILED
SEPTEMBER 16, 1980
RICHARD H. DEAN
CLERK, U.S. COURT OF APPEALS

NO. 80-7493

D.C. #80-02691-WPG
CENTRAL CALIFORNIA

ORDER

Before: Poole & Norris, Circuit Judges.

Upon due consideration, the petition for

writ of mandate has been denied.

An order remanding action to the state court is only reviewable under a very narrow exception to 28 USC §1447(d). See Thermtron Products v Hermansdorfer doctrine 423 USC 336.

Based upon the materials submitted to this court, district courts order of remand does not appear to fall within that exception.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD,

Petitioner,

-vs-

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDonald GROUP, LTD., a Nevada corporation,

Real Parties in Interest.

FILED
SEPTEMBER 19, 1980
RICHARD H. DEAN
CLERK, U.S. COURT OF APPEALS

NO. 80-7504

ORDER

Before: POOLE and NORRIS, Circuit Judges.

Upon due consideration, Michael R. Wood's

second petition for writ of mandamus is denied for the same reasons that his first petition, No. 80-7493, was denied. The court will not entertain any further petitions to review the district court's order of remand.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDonald Group, Ltd., a Nevada Corporation,

Plaintiff,

-vs-

MICHAEL R. WOOD, GEORGE R. WOOD, and DOES II through XX, inclusive,

Defendants.

FILED
AUGUST 18, 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 80 02691 WPG

ORDER REMANDING TO STATE COURT

The Motion of Plaintiff to remand the above entitled cause to the Superior Court of the State of California, in and for the County of Santa Barbara, having been argued, heard and considered, it is

ORDERED that the Motion be granted and that this cause is hereby remanded to the Superior Court of the State of California, in and for the County of Santa Barbara, for further proceedings.

IT IS FURTHER ORDERED by this Court that the Plaintiff have and recover from Defendants its costs incurred in this Court and attorney's fees in the amount of _____ for which execution is awarded.

DATED: August 18, 1980

/s/ WILLIAM P. GRAY
U.S. DISTRICT JUDGE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1021

MICHAEL R. WOOD,

Petitioner,

-vs-

FIVE POINTS SHOPPING CENTER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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FIVE POINTS SHOPPING CENTER,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, MICHAEL R. WOOD, has filed a Petition praying for a Writ of Certiorari to issue to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on September 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not reported, and an opinion on a Petition for Reconsideration filed September 19, 1980, before the Court of Appeals of the Ninth Circuit are appended to the Petition herein.

JURISDICTION

It is the position of Respondent that this Court is without jurisdiction to hear this matter. The matter was before the Ninth Circuit on a Petition for Writ of Mandamus to review an Order

of Remand issued by the United States District Court for the Central District of California pursuant to Title 28 USC §1447(c). Such an Order for Remand is not reviewable on appeal or otherwise. 28 USC §1447(d).

QUESTION PRESENTED

The Petitioner has sought to bring this case within the parameters of Thermatron Products, Inc., v. Hermansdorfer, 423 US 336 (1976). It is the Respondent's position that this opposition will clearly show that this case does not fall within the very narrow parameters of the Thermatron case, supra.

STATEMENT OF THE CASE

This matter arose upon the Petitioner herein filing a Petition for

removal of civil action to the United States District Court for the Central District of California. Said Petition was filed on June 23, 1980. The action sought to be removed was an unlawful detainer (eviction) action filed in the Superior Court of the State of California for the County of Santa Barbara.

Paragraph 2A of the Petitioner's Petition for removal in the United States District Court reads as follows: "There is a complete diversity of citizenship in the aforesaid action in that the Defendant Michael R. Wood is a citizen of the State of California and George R. Wood is a citizen of Virginia. MacDonald Group, Ltd., a Nevada corporation, formerly Five Points Shopping Center, a Limited Partnership and presently dba Five Points Shopping Center. MacDonald Group, Ltd., is a

corporation duly incorporated by virtue of the laws of the State of Nevada and at all times has been a citizen of the State of Nevada." (Emphasis added) Paragraph 2D of Petitioner's Petition in the United States District Court read as follows: "The amount in controversy in the within action exceeds the sum of $10,000.00, exclusive of interest and costs;..."

The Respondent then filed a Notice of Motion to Remand, an Affidavit in Support of Motion to Remand and Points and Authorities in supports of its Motion. The Affidavit in Support of Motion to Remand placed into the record evidence that the MacDonald Group, Ltd., had its principal place of business in the State of California. The Memorandum of Points and Authorities in Support of the Motion to Remand made reference to 28 USC

§1441(b), which read in material part as follows: "...any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought." (Emphasis added) The Memorandum then went on to point out that the Petitioner's moving papers in the United States District Court stated that he was a citizen of the State of California. The Respondent's Points and Authorities filed in the District Court also made reference to 28 USC §1332(c), which provides that a corporation's principal place of business will be deemed the state of its citizenship for removal purposes.

A hearing was then held before the Honorable William P. Gray, United States District Judge for the Central District

of California. That hearing was held on August 18, 1980. A transcript of that hearing was made and appended to Petitioner's PETITION FOR WRIT OF MANDAMUS AND A STAY PENDING HEARING AND DETERMINATION filed with the United States Circuit Court for the Ninth Circuit. In that transcript, Judge Gray made the following statement: "Well, I can't resolve the unlawful detainer case, but it does seem to me, based upon the papers that I have received, that there is probably no diversity. Even if there is diversity, less than $10,000.00 is involved, and it seems to me that what the Defendant is trying to do here is forestall or delay an unlawful detainer action, which is part and parcel of state law." (Reporter's Transcript, page 3, lines 24 and 25; and page 4, lines 1 through 6) Unfortunately,

later in the proceedings, at page 6, line 25, and page 7, line 1, Judge Gray did make the remark referred to on page 5 of the Petitioner's Petition in this matter.

REASONS FOR DENYING THE WRIT

When the entire procedural context and the spoken reason of the United States District Court are fully set forth, it is quite obvious that the Order of Remand was granted for the reasons set forth in 28 USC §1447(c), i.e., "...that the case was removed improvidently and without jurisdiction..." As such, the Order for Remand is not reviewable by this Court or any other court on appeal or otherwise. 28 USC §1447(d).

Notwithstanding 28 USC §1447(d), there has been a very narrow exception created by this Court for review of

Remand Orders were made for reasons other than as set forth in 28 USC §1447(c). That judicial exception is contained in the case of Thermatron Products, Inc., v. Hermansdorfer, 423 US 336. However, Justice White, when stating the question presented by the case at page 337, stated as follows: "The questions presented in this case are whether a federal district judge may remand a properly removed diversity case for reasons not authorized by statute, and, if not, whether such remand may be remedied by a Writ of Mandamus." (Emphasis added) This is simply not a case involving a properly removed state court action; but, on the contrary, it involves an improperly removed state court action, which was remanded for the avowed reason that there was no diversity and there was not sufficient dollars in

controversy. The mere fact of a statement made by the District Court judge that he would not be disposed to try an unlawful detainer action will not, and should not, negate the express prohibition contained in 28 USC §1447(d). In the Thermatron Products case, supra, the trial court, when ordering the remand, had specifically noted that the case had been properly removed, but that his calendar was simply too crowded to take care of it. That is simply not the case here. Judge Gray first noted that he felt the case had not been properly removed and then, perhaps unfortunately, remarked that he was not disposed to try this particular kind of case under any circumstances.

CONCLUSION

For the reasons set forth above, a

Writ of Certiorari should not issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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REPLY IN SUPPORT OF CERTIORARI

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Certiorari To The United States Court of Appeals

For The Ninth Circuit

REPLY IN SUPPORT OF CERTIORARI

I

THIS ACTION WAS PROPERLY REMOVED
IRRESPECTIVE OF RESPONDENT'S ARGUMENT,
HOWEVER PROPER REMOVAL
IS NOT THE PRIMARY ISSUE HERE.

In the respondent's brief filed in response

to petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, the respondent acknowledges that Thermtron Products Inc. v Hermansdorfer, 423 U.S. 336 (1976) permits a review of the court's order of remand when a case is remanded for reasons not recognized by 28 U.S.C. §1447(c) however respondent attempts to distinguish the case at bar as being unparallel to Thermtron by contending that it was improperly removed.

In support of these contentions, the respondent retrieved information stated in its Affidavit in Support of Respondent's Motion to Remand filed in the United States District Court for the Central District of California and realleged the fact that its principal place of business is in the State of California.

Additionally, respondent circumvents the issue of diversity of citizenship by relying on 28 U.S.C. §1441(b) which deals exclusively with jurisdiction on removable civil actions based on presence of federal question. As alleged in

petitioner's petition, the question of diversity comes under 28 U.S.C. §1441(a) which states:

> "Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States . . ."

Clearly, this action was brought in the State court as a civil action with diversity of citizenship of defendants and monetary jurisdiction met under 28 U.S.C. §§1332(a)(1) and §1332(a) respectively. 28 U.S.C. §§1332(a) and §1332(a)(1) further clarify the the language of 28 U.S.C. §1332(a), viz. "original jurisdiction":

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs and is between -
> (1) citizens of different states"

However, the petitioner has demonstrated that this case was properly removed by placing into the District Court's record an affidavit and certified copies of State of Nevada documents

showing the respondent's principal place of business as being in Reno, Nevada and that respondent is incorporated in the State of Nevada.

Curiously enough, the respondent is once again attempting to reallege what it alleged in the District Court, i.e. that this case was improperly removed for lack of diversity of citizenship by misleading the court in using another corporation's principal place of business, namely MacDonald Management Corporation Corporation (which is a California corporation) which is <u>not</u> the same principal place of business as Five Points Shopping Center, the respondent in said action, for purposes of establishing noncompliance with the criteria for diversity as outlined in 28 U.S.C. §1332(a)(1) and §1332(c). Five Points Shopping Center is a Nevada corporation with its principal place of business in Reno, Nevada.

It is settled that the petitioner is a

citizen of Nevada per 28 U.S.C. §1332(c).

Regarding respondent's contentions that the amount in controversy is deficient pursuant to 28 U.S.C. §1332(a), the amount in controversy in the instant action relates to the contract, which entire amount exceeds $100,000, in that this controversy turns on the interpretation of the "lawful money of the United States" clause contained therein regarding the mode of payment of the entire contract, Brotherhood of Locomotive Firemen and Enginemen v Pinkston, 293 U.S. 96, 55 S Ct 1, 79 L.Ed. 219 (1934). As the entire contract amount is in excess of $10,000, 28 U.S.C. §1332(a) is satisfied.

Let there be no doubt that the procedures for removal, 28 U.S.C. §1446, were complied with by the petitioner.

Notwithstanding proper removal, the essential issue to bring this case within the bounds of Thermtron is use of grounds not authorized by statute to decide to remand. This

issue has been properly raised so respondent's arguments concerning propriety of removal should not be considered.

II

THE DISTRICT COURT JUDGE USED DISCRETIONARY GROUNDS TO REMAND AND NOT THOSE PERMITTED BY THE CONTROLLING STATUTE.

The respondent argues that ". . . it is quite obvious that the Order of Remand was granted for reasons set forth in 28 U.S.C. §1447(c) . . .", p. 8, line 10, respondent's brief, and further states that "Judge Gray first noted that he felt the case had not been properly removed and then, perhaps unfortunately, remarked that he was not disposed to try this particular kind of case under any circumstances", p. 10, lines 13-17, respondent's brief.

Judge Gray did not "first note" at the hearing on respondent's motion to remand that he felt the case had not been properly removed. The proper sequence of Judge Gray's thoughts is exemplified in his statement, p. 3, line 24;

p. 4, line 6, Tr. 8/18/80:

> *"Well, I can't resolve the unlawful detainer case,* but it does seem to me based upon the papers I have received that there probably is no diversity. Even if there is diversity, less than $10,000 is involved and it seems to me all that what the defendant is trying to do here is forestall or delay an unlawful detainer action which is part and parcel of state law."

In this quote, Judge Gray's predisposition against unlawful detainer cases is "first noted". Thereafter, Judge Gray mentioned proper removal by saying "there probably is no diversity" and later still, with his *"unfortunate remark"* as respondent refers to it, p. 10, lines 15, 16, respondent's brief, Judge Gray reaffirmed his position against unlawful detainer cases by stating *"This Court is not disposed to try an unlawful detainer case"*, p. 6, line 25; p. 7, line 1, Tr. 8/18/80.

Far from being "obvious" that the remand order was imposed for reasons set forth in 28 U.S.C. §1447(c), it becomes more obvious that Judge Gray decided the action on other than

statutory grounds.

At page 7, line 5, Tr. 8/18/80, Judge Gray stated:

> *"I am not in a position to determine whether or not it was frivolous to have brought* [this action] *it here."* [Emphasis added.]

Perhaps Judge Gray's use of the word "frivolous" was to mean unlawful or improvident, thus expressly declaring he was not using statutory grounds to remand.

Furthermore, the record is replete with evidence of proper removal. Similarly evident, from the district court transcript, is the fact that Judge Gray gave cursory attention to this substantial evidence. These two points render Judge Gray's decision to remand suspect and illuminate the fact that discretionary grounds were the actual point of departure for the decision to remand.

For these reasons there is sufficient evidence that Judge Gray subrogated discretionary grounds for those in 28 U.S.C. §1447(c) which

brings this case within the bounds of Thermtron.

CONCLUSIONS

For the reasons set forth above, the respondent's arguments are without merit and should be disregarded.

Certiorari should therefore be granted to insure that a question affecting all federal courts does not go unattended and that the petitioner is not denied a lawful remedy; "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

Respectfully submitted,

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